88-1104

Supreme Court, U.S.
FILED
DEC 29 1988
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

COMMONWEALTH OF PENNSYLVANIA,

Petitioner

VS.

PAUL GIANNINI AND DOUGLAS VOIGHT,

Respondents

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

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QUESTION PRESENTED FOR REVIEW

1. Whether the Fourth and Fourteenth Amendments to the United States Constitution permit police to enter a home without a warrant to halt ongoing criminal activity which has been lawfully observed by police, even though the "plain view" observations were not "inadvertent", as police expected to observe the criminal activity in question.

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IN THE SUPREME COURT

OF THE UNITED STATES

OCTOBER TERM, 1988

NO. _____

COMMONWEALTH OF PENNSYLVANIA,
Petitioner

VS.

PAUL GIANNINI AND DOUGLAS VOIGHT
Respondents

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF PENNSYLVANIA

Petitioner, the Commonwealth of Pennsylvania, respectfully requests that a Writ of Certiorari issue to review the Judgment and Opinion of the Superior Court of Pennsylvania entered in this case.

OPINIONS BELOW

The opinion of the Superior Court of Pennsylvania is unreported and is set forth in full in Appendix A of this Petition.

The opinion of the Court of Common Pleas of Delaware County is unreported, and is set forth in full in Appendix B of this Petition.

STATEMENT OF JURISDICTION

The judgment of the Pennsylvania Superior Court was entered on March 1, 1988. The Pennsylvania Supreme Court refused review of this matter by an Order dated October 31, 1988. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment Four, which provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

United States Constitution, Amendment Fourteen, Section One, which provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

The instant matters are criminal actions which were initiated by the filing of criminal complaints on October 1, 1986, charging defendants Voight and Giannini with Possession of Cocaine with Intent to Deliver, Criminal Conspiracy and related offenses. Two co-defendants, David Morrow and Michael Savage, were also charged and entered into agreed non-trial dispositions with the Commonwealth. A preliminary hearing was held on December 18, 1986, with defendants Voight and Giannini being held for court. A pre-trial hearing on defendants' motion to suppress was held on June 1, 1987, before the Honorable Anthony Semeraro of the Court of Common Pleas of Delaware County. At the conclusion of this hearing, Judge Semeraro suppressed all evidence seized by the Commonwealth; this Order was reduced to writing on June 17, 1987, at which time Judge Semeraro sua sponte dismissed all charges against the defendants as being de

minimis. The Commonwealth appealed from those orders, and on March 1, 1988, a Pennsylvania Superior Court panel issued a one-page memorandum opinion affirming the lower court. The Pennsylvania Supreme Court refused review of this case.

The facts elicited at the pre-trial suppression hearing revealed that on September 19, 1986, Criminal Investigator Robert Colden of the Haverford Township Police Department received a telephone call from Mr. Edward Stanley of 844 Penn Street, Haverford Township. Mr. Stanley informed Investigator Colden that he had observed the individuals who lived next door at 842 Penn Street engaged in drug use in their second floor front bedroom. Mr. Stanley indicated to Investigator Colden that he had been able to observe these individuals handling small packets containing a white substance, and that the students would dip into these packets and ingest the white substance. In particular, Mr. Stanley identified defendant

Giannini as being one of the individuals engaged in this activity. (N.T. June 1, 1987 at 15-19,28). On September 26, 1986, Investigator Colden together with Officer Joseph Golden were admitted to the Stanley residence in order to observe the activity at 842 Penn Street from the Stanley's third floor room; Investigator Colden was an eight (8) year veteran of the force, and Officer Golden had been an officer for nine and one half (9 1/2) years, with substantial experience in narcotics investigations and arrests. (Id. at 15-16,26-34). On September 26, 1986, the officers observed six individuals drinking in the front bedroom of the defendant's house at 842 Penn Street; by the use of field glasses, the officers were able to observe a pipe with a long tube and small bowl of the type typically used for smoking marijuana, as well as rolling papers of a type used for smoking marijuana cigarettes. After approximately one half (1/2) hour, the six individuals left the house, got into their vehicles and departed

from the area. (Id. at 19-25). On September 27, 1986, Officer Golden returned to the Stanley home at 8:30 P.M. for further surveillance. At 9:15 P.M., Officer Golden observed a white male identified as Michael Savage exit the middle bedroom of the defendant's residence, walk to the front bedroom, pick up an electronic scale, and return to the middle bedroom. Officer Golden then observed Savage plug the scale into an electrical outlet, place a piece of white paper on the scale, pour white powder onto the paper and weigh the substance. In light of Officer Golden's experience and training, he was convinced that Savage was engaged in weighing a controlled substance either for his personal use or for packaging for delivery to another. Inasmuch as Officer Golden was dressed in plain clothes, he called for uniformed officers to meet him at the residence at 842 Penn Street; upon their arrival, Officer Golden walked to the front door of the defendant's residence where he

observed a sign identifying that residence as a "crack house". Officer Golden then knocked on the door and Savage answered. Savage was immediately placed under arrest, and the uniformed detail secured the exterior of the house as Officer Golden made a protective sweep of the premises in order to insure that the other known residents and/or their visitors were not in a position to endanger the officers or destroy evidence. During this protective sweep, Officer Golden observed other drug paraphernalia within the residence, but did not seize it. Upon insuring that no other individuals were present in the premises, Officer Golden seized the white powder which he had observed from his vantage point in the Stanley home; at this time, Officer Golden also seized a razor blade, cash rolled up to form a straw, and a plastic picture frame, all of which were on Savage's bureau together with the white powder. Officer Golden then applied for, and obtained, a search warrant for the entire

premises. (Id. at 27-37,56,62-63). A search pursuant to this warrant was conducted at 11:30 P.M. and resulted in the seizure, inter alia, of the following: tally sheets, glassine bags containing screens, the electronic scale, a box containing an additional scale, a glass vial, a pipe, tweezers, a coffee filter, and several items of drug paraphernalia. See, Search Warrant and Inventory C-13781. A laboratory analysis of these items identified the white powder as cocaine; the analysis further revealed that one scale, two razor blades, two bottles, one vial, the coffee filter, the tweezers and the pipe seized by the officers contained cocaine residue. Moreover, four (4) additional substances found in the residence were identified as Benzocaine, Lidocaine, Mannitol, and Sodium Bicarbonate; all four substances are commonly used as cutting agents for cocaine and other controlled substances. Id. (N.T. December 18, 1986 at 54-59,75-80).

REASONS FOR GRANTING THE WRIT

The instant matter provides this Court with an opportunity to clarify the "plain view" doctrine of search and seizure. On two occasions this Court has discussed the plain view doctrine in plurality opinions; in each of these opinions the Court has discussed but never clearly adopted or rejected an "inadvertence" element to the plain view exception. Coolidge v. New Hampshire, 403 U.S. 443, 91 S.Ct. 2022, 29 L.Ed. 2nd 564 (1971); Texas v. Brown, 460 U.S. 730 103 S.Ct. 1535, 75 L.Ed. 2nd 502 (1983). The uncertainty which has resulted from these decisions has created substantial division and confusion in the appellate courts throughout the United States. See, Search and Seizure, LaFave Section 2.2 (a) (collecting cases). See, United States v. Johnson, 561 F.2d 832 (D.C.Cir. 1977) (officer had seen major narcotics packaging operation through window); United States v. Johnson, 553 F.2d

946 (5th Cir. 1977)(informant gave pre-arranged signal that he had seen drugs in house from which he exited); United States v. Guidry, 534 F.2d 1220 (6th Cir. 1976)(undercover agent had seen counterfeiting apparatus within premises); United States v. Rubin, 474 F.2d 262 (3rd Cir. 1973)(crime in progress with threat of destruction of contraband); United States v. Davis, 461 F.2d 1026 (3rd Cir. 1972); People v. Hopko, 262 N.W.2d 877 (Mich.App. 1977)(police observed contraband in home, thus crime is being committed in the presence of the officer so as to justify entry); State v. Redding, 362 So.2d 170 (Fla.App. 1978); Commonwealth v. Cohen, 359 Mass. 140, 268 N.E.2d 357 (1971)(similar facts to instant case); State v. McGuire, 13 Ariz.App. 539,479 P.2d 187 (1971); Vaillancourt v. Superior Court, 78 Cal.Rptr. 615 (1969)(similar facts to instant case); People v. Robinson, 229 Cal.Rptr. 851 (1986)(same); State v. Pease, 520 A.2d 698 (Me., 1987); Mann v. Mack, 202

Cal.Rptr. 298 (1984); State v. Morris, 18 Or.App. 306, 525 P.2d 201 (1974); People v. Gomez, 632 P.2d 586 (Colo. 1981) (officer saw drugs through motel window); Williams v. State, 331 A.2d 380 (Del. 1975); People v. Clements, 37 N.Y.2d 675, 376 N.Y.S.2d 480, 339 N.E.2d 170 (1975); State v. Drumhiller, 36 Wash.App. 592, 675 P.2d 631 (1984) (similar facts to instant case).

Significantly, some cases in Pennsylvania and other jurisdictions appear to have rejected an "inadvertence" requirement by placing substantial emphasis upon a police officer's observation of a crime in progress in allowing a warrantless entry to seize evidence or contraband in plain view. Commonwealth v. Pullano, 295 Pa.Super. 68, 440 A.2d 1226 (1982); Commonwealth v. Shannon, 320 Pa.Super. 552, 467 A.2d 850 (1983); Commonwealth v. Johnson, 247 Pa.Super. 208, 272 A.2d 11 (1977); Cubler, Hopko, Cohen, Pease, Velsquez, United States v. Johnson, Gomez, Drumhiller. Moreover, these holdings

appear consistent with older authority of the United States Supreme Court on this issue. For example, in Agnello v. United States, 269 U.S. 20, 46 S.Ct. 4, 70 L.Ed. 2d 145 (1925), the Court stated as follows:

> The right without a search warrant contemporaneously to search persons lawfully arrested while committing crime and to search the place where the arrest is made in order to find and seize things connected with the crime as its fruits or as the means by which it was committed as well as weapons and other things to effect an escape from custody is not to be doubted. (Citations omitted)

Moreover, in United States v Marron, 275 U.S. 192, 48 S.Ct. 74, 72 L.Ed. 231 (1927), the Court reaffirmed this principle, and stated the following:

> The officers were authorized to arrest for crime being committed in their presence and they lawfully arrested Birdsaw. They had a right without a warrant contemporaneously to

> search the place in order to find and seize things used to carry on the criminal enterprise . . . . The authority of officers to search and seize things by which the nuisance was being maintained extended to all parts of the premises used for the unlawful purpose.

Consequently, inasmuch as the officers in the instant matter were properly in a position to observe the contraband in the defendants' premises, and given the immediacy of the criminal activity which was occurring in the presence of the officers, the officers should be seen as entitled to enter the premises to seize the items which they had observed. Therefore, the "inadverence" requirement of the plain view doctrine should be rejected forthrightly by this Court.

CONCLUSION

For all the foregoing reasons, the Commonwealth of Pennsylvania respectfully requests that a Writ of Certiorari issue to review the decision below.

Respectfully submitted,

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A P P E N D I X

COMMONWEALTH OF PENNSYLVANIA,

VS

PAUL GIANINI, Appellee

COMMONWEALTH OF PENNSYLVANIA

VS

DOUGLAS VOIGHT, Appellee

IN THE SUPERIOR COURT OF

PENNSYLVANIA

NOS. 01730 Philadelphia, 1987
01731 Philadelphia, 1987

JUDGMENT

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by the Court that the judgment of the Court of Common Pleas of Delaware County be, and the same is hereby Affirmed.

BY THE COURT;

David A. Szewczak
Prothonotary

Dated: March 1, 1988

APPENDIX "A"

COMMONWEALTH OF PENNSYLVANIA

VS

PAUL GIANINI, APPELLEE

COMMONWEALTH OF PENNSYLVANIA

VS

DOUGLAS VOIGHT, APPELLEE

IN THE SUPERIOR COURT OF PENNSYLVANIA

NOS. 01730 Philadelphia, 1987
01731 Philadelphia, 1987

Appeal from the Order of the Court of Common Pleas of Dealware County, Criminal at Nos. 6965 and 6967 of 1986.

BEFORE: CIRILLO, P.J., McEWEN, AND MONTEMURO, JJ.

MEMORANDUM:

These are consolidated Commonwealth appeals from an order which granted appellees' motion to suppress and which dismissed all charges against appellees. Appellant argues that evidence properly observed by police officers in plain view should not have been suppressed by the trial court, and that the trial court improperly dismissed the charges against appellees as de

minimis. After a careful review of the record, we find that the trial court's opinion has adequately disposed of appellant's arguments and we therefore affirm.

Order affirmed.

IN THE COURT OF COMMON PLEAS OF
DELAWARE COUNTY, PENNSYLVANIA
CRIMINAL DIVISION
COMMONWEALTH OF PENNSYLVANIA

VS

DOUGLAS VOIGHT

AND

PAUL GIANNINI

NOS. 86-6965, 86-6967

John Auritt, Esquire, Attorney for Defendants Voight and Giannini, 130 E. State Street Media, PA 19063

Sandra Elias, Esquire, Assistant District Attorney, District Attorney's Office, Courthouse, Media, PA 19063

O P I N I O N

Semeraro,J. Filed: JUL 8, 1987

This Appeal by the Commonwealth of Pennsylvania is from a June 20, 1987 Order granting Defendants' Motion to Suppress State's evidence on the ground that it was

obtained pursuant to a violation of Defendants' constitutional right against unreasonable searches and seizures. The suppression of evidence in these circumstances prompted the Court to grant defendants' Motion to Dismiss the charges.

I. FACTUAL BACKGROUND

Considering the suppression record[1] the facts are: On September 19, 1986, Mr. Stanley of 842 Penn Street, Haverford Township, a previously `unencountered' informant told a Haverford Township Policeman that he saw into the house next door where neighboring college students engaged in what "looked like they were using drugs." Responding to that information Officer Colden went to the informant's home on the above date to observe. He was prevented as the lights were all extinguished in Defendants' residence next door. He departed returning exactly one week later, (on the next Friday), September 26, 1986 accompanied by Officer Golden, a fellow officer. Positioned on the third floor the two officers, viewed the second floor by field glasses. They observed 5 or 6 college students on the second floor next door. They

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[1]Due to the unavailability of Notes of Testimony at the time f this writing this Opinion is based on the recorded tapes and bench notes taken at the suppression hearing.

observed the college students drinking wine and noticed what appeared to be drug paraphernalia on a small drum beside them.

This particular surveillance was terminated by the extinguishing of lights in Defendants' home one-half hour after it commenced. Neither officer could give a certain or accurate description of "the pipe or packet of rolling papers" allegedly seen on a small drum one floor below them at a distance of 45 feet. This they testified is the sum total of all "drug paraphernalia" seen.

The next night, September 27, 1986 at 9:00 p.m., Officer Golden Returned alone to the Stanley's third floor for additional surveillance. The light was on in the middle room second floor. This particular observation lasted approximately 20 minutes. Officer Golden, who has had minimal experience in narcotics investigation, observed one white male go from the middle bedroom to the front room, retrieve a small box and plug it in a socket in the middle room. He

testified he then observed the suspect "pouring a white powder" on what he assumed was an electronic scale. He further testified that based on the statements of Officer Colden, who originally received the information from Mr. Stanley the week before, on these two surveillances and that the suspect left the middle room, Officer Golden called for backup, rushed next door and knocked on the door. Michael Savage was arrested as he answered the door as the sole occupant of 842 Penn Street. He was arrested with a warrant. Officer Golden made a search of the entire upstairs and down of the house. After competing the search and still without incident indicating the threat of evidence being destroyed or removed, three uniformed officers "secured" the house for the following two hours while awaiting Officer Golden's return with a search warrant. Probable cause for the search warrant was supported by the aforesaid facts and items gathered at the

initial warrantless search, incident to Mr. Savages's warrantless arrest.

Search warrant in hand, the arresting officers then seized a quarter gram of cocaine, one electronic scale with residue, and various paraphernalia, as evidence for criminally prosecuting Defendants for Possession of a Controlled Substance with Intent to Distribute, Possession of Drug Paraphernalia, Criminal Conspiracy, and Receiving Stolen Property.[2] This appeal is from our Order to Suppress these items of evidence on the grounds that they are "fruit of the poisonous tree" obtained pursuant to an illegal search and seizure.

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[2]As stated on the affidavit of probable cause in support of warrants to arrest Defendants, the following items were confiscated from defendants' bedroom: a glassine bag containing a white powder, an electronic scale with residue, several small screens with residue, a Tylenol bottle containing white powder, tally sheets, $195.00 cash, an ID for Paul Giannini, and a letter addressed to Doug Voight, 842 Penn Street, Bryn Mawr, PA. None of the white powder was found to be a controlled substance. (See Exhibit A attached.)

II. ILLEGAL ARREST AND SEARCH

A. Warrantless Arrest

It is well established that in order for information received from an informant to be considered sufficient to support probable cause it must first meet the minimum standards of one or two Federal doctrines followed in the Pennsylvania Courts: the Aguilar-Spinelli test requires proof of informant's reliability and a "substantial basis" for the informant's knowledge of facts. Aguillar v. Texas, 378 U.S. 108 (1964) and Spinelli v. United States, 393 U.S. 410 (1969). The "totality of the circumstances" applies a less rigid standard, but a minimum "a sufficiency of details to corroborate a substantial basis for concluding probable cause" must be present. Illinois v. Gates, 462 U.S. 213 (1983); See Com. V. Baker, ____Pa.____, 518 A.2d 802 (1986).

This Court concluded that under either mandate the informant in the case at bar

previously unknown to police, and whose only basis of knowledge was an unamplified visual contact of what "looked like" drug use from 45 feet away, is not enough to satisfy the minimum requirements for justification of a warrantless arrest and search. Commonwealth v. Chandler, 505 Pa. 113, 477 A.2d 851 (184), Commonwealth v. Monte, 459 Pa. 495, 329 A.2d 836 (1974).

Because the surveilling officers' testimonies were filled with uncertainty as to the description of paraphernalia, as to what exactly they saw in the way of drugs and their lack of experience, this Court concluded that in these circumstances enough to lead a reasonable man to believe that a warrantless arrest is justified, let alone the initial warrantless search. Chandler, and Monte, supra.

B. Unlawful Search Incident To a Warrantless Arrest

The rule in Pennsylvania regarding searches incident to valid arrest (assuming it

is valid) follows the rule of Chimel v. California, 395 U.S. 752 (1969) which limits the scope of the search to the "area within the immediate accessibility of the suspect" with the officers' safety in mind (referred to as the Chimel "wingspan".) Absent any exigent circumstances or reasonable apprehension of the officers' own personal safety the officers are limited to searching only the area within the suspects immediate control. Commonwealth v. Walker, 348 Pa.Super. 207, 501 A.2d 1143 (1985), Commonwealth v. Curry, 343 Pa.Super. 400, 494 A.2d 1146 (1985). The Commonwealth has failed to prove a legitimate expectation on the part of the arresting officers that evidence would have been destroyed or removed, or that their personal safety was in danger or that anyone else was in this house at this time and under these circumstances. Officer Golden was therefore unjustified in searching Defendants' entire home. Walker and Curry, supra.

In Pennsylvania the burden is upon the Commonwealth to prove by preponderance of the evidence that the search and seizure did not violate the Fourth Amendment. Commonwealth v. Cihylik, 337 Pa. Super. 221, 486 A.2d 987 at 989) 1985).

Officer Golden testified he observed no other occupants. He observed no weapons and none were found, during pre-arrest surveillance or during the arrest procedures. The Defendant was both polite and passive while being placed under arrest. Under these circumstances there was no evidence of any emergency requiring an immediate, unbridled search.

It is not enough that a policeman believes the facts he has are probable cause for a search warrant. The people of this state are constitutionally guaranteed an independent determination of probable cause by a neutral and detached magistrate. Both the Fourth Amendment of these United States and Article 1, Section 8 of our Pennsylvania

Constitution prohibit unreasonable searches and seizures, Commonwealth v. Chandler, 505 Pa. 113, 477 A.2d 851 (1984) -- "When the right of privacy must yield to the right of search is, as a rule, to be decided by a judicial officer, not by a policeman or government agent." Id at 855, quoting Johnson v. United States, 333 U.S. 10 (1948).

In the present case the arresting officer testified that no other activity besides that of Mr. Savage was observed that the officer believed no other individuals were present.

Exigent circumstances exist when there is a genuine emergency regarding the destruction, consumption, or removal of evidence so as to make it unreasonable to require a warrant. Vale v. Louisiana, 399 U.S. 30 (1970).

From the facts presented this Court believes that no exigent circumstances existed, the officers had an opportunity to get a warrant but did not, and therefore made a search and seizure of the residence in

violation of Defendants' constitutional rights. We further decline to hold that an arrest at the front door can provide it's own exigent circumstances so as to justify a warrantless search of a Defendant's house. See, Commonwealth v. Curry, 343 Pa. Super. 400, 494 A.2d 1146 (1985); CF, Commonwealth v. Henkel, 306 Pa. Super. 346, 452 A.2d 759 (1982); See also Commonwealth v. Guyton, 230 Pa. Super. 168, 326 A.2d 913 (1974).

C. Exclusionary Rule

The Exclusionary rules of the State of Pennsylvania hold tainted evidence inadmissible because of the illegal manner in which it was obtained, regardless of whether this illegality affects the reliability of the proof. Commonwealth v. Anderson, ___Pa.___, 520 A.2d 1184 (1987), Commonwealth v. Lovette, 498 Pa. 665, 450 A.2d 975 (1982). The purpose of the rule is to deter unlawful police conduct and to promote judicial integrity which is fulfilled only if a determination of probable cause is

made before and not after the search. Commonwealth v. Chandler, 505 Pa. 113, 477 A.2d 851 (1984).

However, Officer Golden, relying on his own experience and a "Haverford Township Police Procedure", did conduct an unreasonable search of Defendants' residence under the pretense of safety. Under all the credible evidence in all these circumstances we conclude that the Golden search was an attempt to support his affidavit of probable cause for the warrant which in turn led to the arrest of, and charges against, the Defendants Paul Giannini and Douglas Voight.

A written affidavit of probable cause is to insure a recorded accurate account of the facts upon which the issuing authority must rely. Commonwealth v. Chandler, supra, at 115. In this case we believe these facts were gathered in violation of the laws of this state. All evidence pursuant to that violation must be excluded. Mapp v. Ohio, 367 U.S. 643 (1961); Chandler, supra.

Without the fruits of the original illegal search, the affidavit for a search warrant is so lacking in indicia of probable cause as to make the final search an unreasonable intrusion into Defendants' privacy and therefore unconstitutional. Vale v. Louisiana, 399 U.S. 30 (1970). Because of this illegality, the Commonwealth's evidence against the Defendants must be excluded. Commonwealth v. Nelson, 488 Pa. 148, 411 A.2d 740 (1980).

D. Dismissal of Charges

Without the physical evidence of drugs,[3] drug paraphernalia or stolen property, suppressed as evidence due to the illegal manner by which it was obtained, the Commonwealth is without a case against Defendants. We have determined after a review of the entire record that without the

---

[3] The only controlled substance found in Defendants' room, and therefore in their constructive possession, were the residues from the drug paraphernalia obtained during the illegal search. The other white powders confiscated from Defendants' room were found to be legal substances not classified as "controlled".

suppressed evidence no evidence remains to sustain the charges and as a result Defendants should be discharged and the case dismissed in the interest of judicial economy and integrity of the judiciary system. See, Commonwealth v. Poindexter, 484 Pa. 472, 399 A.2d 390 (1979).

In view of the aforesaid in the totality of these circumstances and in addition thereto the matter is dismissed as de minimis. See, Commonwealth v. Jackson, 510 A.2d 1389 (Pa. Super 1986); See also 18 Pa.C.S.A. §312.

For the above reasons our June 20, 1987 Order suppressing the evidence and dismissing the charges should be affirmed.

BY THE COURT:

_____
Anthony R. Semeraro

SUPREME COURT OF PENNSYLVANIA

Eastern District

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November 4, 1988

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DISTRICT ATTORNEY'S OFFICE
Delaware County Courthouse
Media, PA 19063

RE: Commonwealth of Pennsylvania, Petitioner v. Douglas Voight and Paul Giannini,
No. 329 E.D. ALLOCATUR DOCKET 1988

Dear Mr. McAndrews:

This is to advise you that the following Order has been endorsed on your Petition for Allowance of Appeal, filed in the above captioned matter:

"October 31, 1988.

Denied.

Per Curiam."

Very truly yours,

Marlene F. Lachman,
Esquire
Prothonotary

/mz
cc: Jon J. Auritt, Esquire

APPENDIX "C"

88-1104

Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

COMMONWEALTH OF PENNSYLVANIA,
Petitioner

v.

PAUL GIANNINI AND DOUGLAS VOIGHT,
Respondents

BRIEF IN OPPOSITION TO PETITION FOR WRIT FOR CERTIORARI FROM THE SUPREME COURT OF PENNSYLVANIA

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COUNTER-QUESTION PRESENTED FOR REVIEW

The "question" presented by the Commonwealth was not actually before the trial court because (1) the police only had a suspicion that they were observing ongoing criminal conduct; and (2) the defendants were not procecuted primarily due to what the police had observed prior to entry, but with what was subsequently found in a separate bedroom they shared after the police pretextually claimed they were making a routine security search of the entire residence. Furthermore, as discussed in the Brief in Opposition to Petition for Writ for Certiorari to the Supreme Court of the United States, other critical questions are also involved here that were decided adversely to the Commonwealth.

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REASONS FOR DENYING THE WRIT

Even if the Commonwealth of Pennsylvania is correct that there is some confusion among the lower courts in their interpretation of the "inadvertence" requirement of the plain view doctrine as established in Coolidge v. New Hampshire, 403 U.S. 443, 470, 91 S. Ct. 2022, 2040, 29 L. Ed. 2d 564, 585 (1971), this present case is an inappropriate vehicle for resolving the problem for a number of significant reasons:

(1) Probable cause did not exist for the police to obtain a warrant for the original entry into the dwelling where defendants resided. The tip from the previously "unencountered" informant that the residents "looked like they were using drugs," supplemented by the observations of a police officer, who

was relatively inexperienced in narcotic investigation, did not meet the "totality of the circumstances" requirement of Illinois v. Gates, 462 U.S. 213, 103 S. Ct. 2317, 76 L. Ed. 2d 527, reh. denied, 463 U.S. 1237, 104 S. Ct. 23, 77 L. Ed. 2d 1453 (1983). Through binoculars from a residence next door, a police officer testified he saw what he and another officer thought were "a pipe and a packet of rolling papers," and, later, he saw an individual "pouring a white powder" on what he thought was an electronic scale. No doubt the officer was suspicious, but suspicion does not rise to the level of probable cause.

(2) Even if probable cause existed for the police to obtain a warrant to arrest the person observed by them or to search the immediate area where they observed the individual, the police chose to enter this residence without a

warrant, arrest the individual observed and search the entire house including the separate and private bedroom shared by the defendants, who were not observed by the police or present when the police were in the residence. No adequate showing was made of exigent circumstances, such as the likely destruction of evidence or departure of the observed individual, that would justify the failure of the police to obtain a warrant.

(3) Even if the warrantless entry was constitutionally permissible, it was improperly effected, because the officers did not "knock and announce" their presence. No exigent circumstances existed to justify this failure either. See Commonwealth v. Eiliff, 300 Pa. Super 423, 446 A.2d 927 (1982); Commonwealth v. Beard, 282 Pa. Super. 583, 423 A.2d 398 (1980).

(4) The search incident to the arrest went far beyond the permissible scope allowed in Chimel v. California, 395 U.S. 752, 89 S. Ct. 2034, 23 L. Ed. 2d 685, (1969), reh. denied, 396 U.S. 869, 90 S. Ct. 36, 24 L. Ed. 2d 124 (1969). Officers conducted a general search thoughout the entire residence and entered the separate and private bedroom of the defendants, and the separate and private bedroom of another tenant as well, all of whom were residing there along with the individual the police had observed and arrested upon entry. Although no one other than the suspect arrested at the door was thought by the police to be in the building, and the police never articulated any potential danger they though imperiled them, this

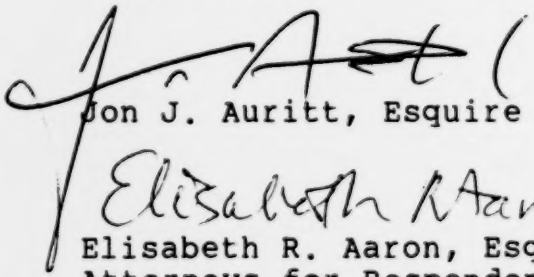
room-by-room search was speciously rationalized by the police as a routine security measure when it was obviously a purposeful illegal search for drugs and related contraband.

(5) The observations made by the police when they were illegally in defendants' bedroom looking around then became the basis the police used to obtain a search warrant (the affidavit for which was phrased in unspecific and conclusionary language) to seize drug paraphenalia from defendants' bedroom for which defendants were ultimately arrested and which was eventually and properly surpressed.

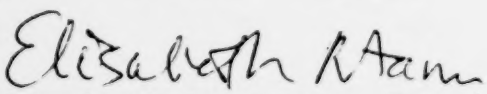
CONCLUSION

For all the foregoing reasons, Respondents respectfully request that the Petitioner for Writ of Certiorari be denied.

Respectfully submitted,



Jon J. Auritt, Esquire



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